No. 94-130

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOAN BACON,

Petitioner,

—v.—

EILEEN WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITIONER'S REPLY TO OPPOSITION BRIEF

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PETITIONER'S REPLY TO OPPOSITION BRIEF[1]

Respondents' effort to cast this interstate custody dispute as a "factual" controversy raising no "important" legal issues, *see* Respondents' Joint Brief in Opposition, at 12 ("Opp. Cert."), ignores the significant conflicts in the States' interpretation of the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A ("PKPA"). In fact, Minnesota's interpretation of the PKPA in this case conflicts with twenty-three (23) other States, *see* Petition for a Writ of Certiorari, at 23-26 & nn.30-32; *id.* at 29 & n.36 (July 18, 1994) ("Cert. Pet."), and respondents cite no decision from any court to support their contrary claim. *See* Opp. Cert., at 12-13, 16-18.

Incredibly, respondents fail even to mention the PKPA's priority rule banning simultaneous custody proceedings, *see* 28 U.S.C. § 1738A(g), interpreted by Minnesota in conflict with the decisions of seventeen (17) other States. Cert. Pet., at 24-26 & nn.30-31. Apparently, respondents believe they need not address this issue if they can persuade this Court that the second question -- involving the PKPA's emergency jurisdiction -- should not be reviewed. They are mistaken. If petitioner prevails on *either* question presented, the Minnesota custody proceeding must be dismissed. Neither question's suitability for review depends on the other. So, even if respondents were correct that this Court should not review whether there was a basis for emergency jurisdiction in Minnesota, *but see infra* at 4-6, petitioner will still prevail if this Court adopts the interpretation of § 1738A(g) followed by the majority of States, and holds that the first-filed

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[1] Respondents hint something is amiss because the petition does not use the caption used in the Minnesota Court of Appeals, "*In Re Custody of T.B.*" Respondents' Joint Brief in Opposition, at ii. But "counsel is not bound by the caption used in the court below;" indeed, counsel should "[a]void such captions -- even though they may have been used in the courts below -- as *In re John Smith, Ex Parte Arthur Jones, In the Matter of William Cartwright* . . . ." Robert L. Stern et al., *Supreme Court Practice* 343, 344 (6th ed. 1986). Talassa was clearly identified as the subject of the custody dispute in the petition, *see* Petition for a Writ of Certiorari, at ii (July 18, 1994), and her attorney was properly served with three copies of the petition.

New York proceeding bars the exercise of jurisdiction in Minnesota.

As for emergency jurisdiction, 28 U.S.C. § 1738A (c)(2)(C)(ii), respondents pretend the dispute is factual, namely, whether there is "enough evidence of abuse in this case to constitute an 'emergency'." Opp. Cert., at 14. But the real issue is whether Minnesota erred in basing emergency jurisdiction solely on an *attorney's* "assertion" of abuse, with *no* supporting evidence whatsoever. On this question of *law*, the holding below conflicts with nine (9) other States. Cert. Pet., at 29 & n.36.

It is hard to imagine conflicts that would more completely undermine the PKPA's central goal of establishing uniform national jurisdictional standards and avoiding jurisdictional competition and conflict between State courts in interstate custody disputes. *See* Cert. Pet., at 15-18. Indeed, as the Department of Justice recently found, the States' conflicting interpretations of the PKPA are at the heart of a national epidemic of child abductions by family members. *See* Linda K. Girdner, Ph.D. & Patricia M. Hoff, Esq., U.S. Dep't of Justice, *Obstacles to the Recovery and Return of Parentally Abducted Children: Research Summary* 6-7 (1994), *discussed infra* at 6-8. Thus, this case presents federal questions of national significance in an area of law badly in need of this Court's authoritative voice.

I. RESPONDENTS IGNORE THE CONFLICTS IN THE STATES' INTERPRETATION OF THE PKPA RAISED BY THE DECISION BELOW.

The decision below presents the States' conflicting interpretations of the PKPA in stark relief. Twenty-three (23) States conflict with Minnesota on one or both of the questions presented in the petition, while only three States support Minnesota's holding on either point. Cert. Pet., at 23-26 & nn. 30-32; *id.* at 29 & n.36. Respondents would wish this problem away, insisting that the decision below "does not conflict with the decision of another court of last resort on the same issue." Opp. Cert., at 13; *see also id.* at 1, 12, 16, 18. But respondents give

no answer to the many conflicting decisions cited in the petition nor offer a single authority to support their argument. *See, e.g., id.* at 16-18.[2] The States' conflicting interpretations of the PKPA are real, long-standing and will not disappear.

A. Respondents Do Not Even Mention § 1738A(g)'s Ban On Simultaneous Interstate Custody Proceedings.

Respondents ignore the PKPA's prohibition of simultaneous interstate custody proceedings. 28 U.S.C. § 1738A(g). Although comprising the bulk of the petition, which cites authorities from seventeen (17) States in conflict with Minnesota's decision below on this point, Cert. Pet., at 24-26 & nn.30-31, respondents do not mention it at all.

To distract attention from their silence on § 1738A(g), respondents instead contend that New York's *ex parte* temporary custody order of August 13, 1993, should not be entitled to full faith and credit. *See* Opp. Cert., at i, 17-18. But this issue is not before the Court.[3] Petitioner never sought full faith and credit for the New York order in her motion to dismiss in the trial court, she never raised this issue in her appeals below, and she does not raise this question in her petition to this Court. Nor did the Minnesota Court of Appeals decide or even mention this question, contrary to respondents' belief. *Compare* Opp. Cert., at 18 *with* Cert. Pet. App., at 3a-4a.

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[2] Respondents say the decision below "is consistent with the opinions of this Court," Opp. Cert., at 1, but this Court has never interpreted the PKPA, other than to hold that it creates no federal cause of action. *See Thompson v. Thompson*, 484 U.S. 174 (1988).

[3] Although an *ex parte* custody order may not always be entitled to interstate enforcement, its issuance does not forfeit jurisdiction nor allow another State to exercise jurisdiction in a simultaneous proceeding. *See* Cert. Pet., at 23-25 & nn. 29-30.

B. The Conflict Over The PKPA's Emergency Jurisdiction Is Not How Much Evidence Of Abuse Is Necessary To Support The Exercise Of Jurisdiction, But Whether Emergency Jurisdiction Can Exist Without Any Evidence Of Abuse At All.

Respondents' analysis of the PKPA's emergency jurisdiction provision works a major distortion of the question presented.[4] The issue is *not* whether "certain conduct rises to the level of abuse so as to constitute an emergency," *nor* whether an incident of abuse is "sufficient . . . evidence for the trial court to . . . determin[e] that an 'emergency' existed," *nor* whether there is "enough evidence of abuse in this case to constitute an 'emergency'." Opp. Cert., at 14. Rather, the issue is whether a State has emergency jurisdiction under the PKPA when there is *no evidence* of abuse. *See id.* at i; Cert. Pet., at 28-29 & n.36.

Relying on one incident of physical injury to Talassa, respondents claim she was "abused in the past." Opp. Cert., at 13. But even leaving aside the undisputed fact that the New York State Social Services Department investigated this incident and found *no abuse had occurred*, Cert. Pet. App., at 35a-36a, 47a-48a, 56a, 59a, respondents concede that *past* conduct (here an incident which occurred *two years* before the Minnesota case began) cannot support the exercise of "emergency" jurisdiction. Opp. Cert., at 14; *see also* Cert. Pet., at 27-29. As respondents acknowledge, the decision to sustain emergency jurisdiction here hinges on "the allegation of a recent specific threat." Opp. Cert., at 11, 14, 16; *see also* Cert. Pet. App., at 3a.

But there is no evidence of such a threat. Respondents talk of Talassa's "allegation" of abuse, *see* Opp. Cert., at 13, 15, but Talassa has never made any statement -- written or oral, sworn or unsworn, on the record or *in camera* -- at any point in this

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[4] Respondents admit emergency jurisdiction is the only basis for Minnesota's jurisdiction under the PKPA. Opp. Cert., at 11 n.4.

entire proceeding. *See* Cert. Pet., at 2 n.1, 5, 10 n.8.[5] Rather, as respondents concede, the only source for this claim of threatened abuse is an *attorney's* assertion at oral argument, Opp. Cert., at 15, made without support in the evidentiary record.[6]

Petitioner does not believe "that only sworn or written allegations" of abuse should be considered by a trial court. Opp. Cert., at 15. But petitioner does contend that when an assertion of emergency jurisdiction is challenged, the party asserting jurisdiction must come forward with some evidence. The "arguments or other remarks of the attorneys are not evidence," 4 David Herr & Roger Haydock, *Minnesota Practice* 9 (1986), and no factual assertion by counsel can be considered when it does not otherwise have support in the evidentiary record. *See Parkside Mobile Estates v. Lee*, 270 N.W.2d 758, 763 (Minn. 1978) (rejecting assertion argued by counsel that "had no support in the evidence"); *Ellwein v. Holmes*, 68 N.W.2d 220, 222 (Minn. 1955) (reversing verdict and granting new trial due to closing remarks by counsel where "there was no evidence to justify the remarks made").[7]

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[5] That Judge Thuet was uninterested in meeting with Talassa *in camera*, Opp. Cert., at 8, 15, does not explain why respondents did not submit a statement from Talassa (or any other evidence) in response to petitioner's motion to dismiss.

[6] Respondents' claim that "T.B.'s allegation that she was threatened with further mistreatment is undisputed," Opp. Cert., at 15, is doubly wrong. First, Talassa never made *any* allegations of abuse. Second, throughout this case, whenever respondents' *attorneys* have claimed abuse, petitioner has disputed those assertions. *See, e.g.*, Cert. Pet., at 6-7, 9-13, 29; Cert. Pet. App., at 35a, 56a, 58a; Transcript of Proceedings, at 23 (Aug. 18, 1993), in *In the Matter of the Welfare of: Talassa Bacon-Williams* (Minn. Dist. Ct.); *see also* Affidavit of Joan Bacon in Support of Petition for Custody, ¶¶ 2-6 (Sept. 20, 1993), *filed in Bacon v. Wilson*, No. V14795/93 (N.Y. Fam. Ct.).

[7] Respondents contend that Talassa's attorney was properly allowed to (continued...)

Petitioner's challenge to Minnesota's exercise of emergency jurisdiction presents not a question of fact, but a pure question of law: Can a court assert emergency jurisdiction under the PKPA in the absence of any evidence of actual or threatened abuse? On this question of law,[8] the holding below conflicts with nine (9) other States. Cert. Pet., at 29 & n.36.

II. THE STATE COURTS BADLY NEED THIS COURT'S INTERVENTION TO RESOLVE THE CONFLICTING INTERPRETATIONS OF THE PKPA.

The Department of Justice recently found that due in part to conflicting legal interpretations of the PKPA, a widespread problem of child abduction persists in the United States. "An estimated 354,100 children were abducted by parents or family members in the United States in 1988 . . . . The abductors of an estimated 163,200 children, or nearly one-half of all the abducted children, took the children across State lines, concealed them, or prevented contact." Linda K. Girdner, Ph.D. & Patricia M. Hoff, Esq., U.S. Dep't of Justice, *Obstacles to the Recovery and Return of Parentally Abducted Children: Research Summary* 1 (1994) (footnote omitted) ("DOJ Study").

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[7] (...continued)
"speak for" Talassa concerning allegations of child abuse. Opp. Cert., at 15. Minnesota law, however, specifically provides that a person may testify to a child's out-of-court statements of abuse *only if* (a) the child is less than ten years old; (b) *after a hearing* the court finds there are sufficient indicia of reliability; (c) the child either testifies or is unavailable as a witness *and* there is other corroborative evidence; and (d) any adverse party is given notice of the statement "sufficiently in advance of the proceeding." Minn. Stat. Ann. §595.02(3); *see also* Minn. Stat. Ann. § 260.156. These circumstances do not apply here.

[8] Respondents' contentions concerning the trial court's discretion to decide issues of fact are beside the point, *see* Opp. Cert., at 14-16, because questions of law are reviewed *de novo*. *See, e.g., Frost-Benco Electric Ass'n v. Minnesota Public Utilities Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

Although the PKPA provides a response to this problem by establishing uniform national jurisdictional standards for interstate custody disputes, *see* Cert. Pet., at 15-18; Cert. Pet. App., at 24a, "many appellate judges are unaware or improperly informed of the PKPA in cases in which it should have been applied. In a nationwide sample, half the judges surveyed reported that counsel rarely, if ever, informed them of the PKPA in cases in which it was applicable. Over 40 percent of the responding attorneys said that judges were unfamiliar with the PKPA . . . ." DOJ Study, at 15. *See also* Cert. Pet., at 18 n.21.

Compounding this problem and presenting "major obstacles" to the recovery of abducted children, DOJ Study, at 5, the DOJ Study found that "*inconsistency in court interpretations of this Federal statute contribute to the occurrence of simultaneous proceedings* and issuance of conflicting custody orders." *Id.* at 7 (emphasis added). *See* Cert. Pet., at 23-26 & nn.30-31; *id.* at 29 & n.36 (citing conflicts). For example, the DOJ Study noted that "courts have varied as to whether emergency ex parte orders should be enforceable in another State." *Id.* Similarly, "[l]ack of clarity and specificity in the emergency jurisdiction provision of the PKPA, *and varied court interpretations of it*, compound problems of simultaneous proceedings and the enforceability of child custody orders." *Id.* (emphasis added).

Contrary to respondents' claim that this case involves a factual dispute affecting only the individual litigants and raising no important questions of law, Opp. Cert., at 12, the DOJ Study demonstrates that the conflicting legal interpretations of the PKPA raised by the petition contribute significantly to the national epidemic of child abduction by family members.[9] This

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[9] By repeatedly overstating Talassa's age as sixteen, *see* Opp. Cert., at 2, 12, 13, 19 (Talassa was fourteen when this proceeding began a year ago, *see* Cert. Pet. App., at 14a), respondents apparently suggest this factor renders immaterial any concern with the problems that motivated passage of the PKPA. But the PKPA specifically applies to any "'child' (continued...)

area of the law cries out for the Court's authoritative voice.

III. RESPONDENTS' "FACTS" BEAR LITTLE RELATION TO THE EVIDENTIARY RECORD.

To escape this conclusion, respondents obfuscate. In the face of a clear evidentiary record that squarely raises the legal questions presented, respondents throw up a cloud of "facts" to persuade this Court that the case is hopelessly mired in factual controversy. Upon examination, however, respondents' "facts" bear little relation to the evidentiary record. They largely consist of *attorneys'* statements made during oral argument masquerading as "evidence," or of outright misstatements. The conflicting interpretations of the PKPA presented by this case are real; the factual disputes are not.

Respondents do not deny the evidentiary record in the trial court below is comprised of the Transcript of Proceedings held on August 18, 1993 and the affidavit of Joan Bacon. Cert. Pet. App., at 28a-52a, 53a-61a. *See* Cert. Pet., at 2 n.1, 5, 10 n.8. Having offered *no* evidence in the trial court to support their position -- not even a conclusory statement by Talassa or Eileen Wilson -- respondents now try two paths to circumvent this problem.

First, respondents make assertions which have no basis in the evidentiary record, by relying on statements made by their *attorneys* during oral argument. Respondents bootstrap their attorneys' assertions, made without evidentiary support in the first instance, by repeating those same assertions in their brief to this Court, and citing the attorneys' original, unsupported assertions as the purported "record" to support these claims.

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[9] (...continued)

. . . under the age of eighteen," 28 U.S.C. § 1738A(b)(1), indicating Congress does not share the view that teenagers should be abandoned to manipulative abductions by their adult relatives.

For example, in his oral argument before Judge Thuet, respondent Wilson's attorney, Jeffrey Orren, asserted that the New York State Department of Social Services found no abuse had occurred in the one incident of physical injury to Talassa, only because Talassa had "recanted" prior allegations of abuse. But respondents have never offered a scintilla of evidence -- not even a statement by Talassa herself -- that Talassa ever made any allegations of abuse ("recanted" or otherwise), or that the New York investigation was incomplete or inadequate in any way. In her sworn affidavit to the trial court, petitioner flatly denied Mr. Orren's assertion, stating "Talassa did not 'recant' her allegations of abuse quite simply because there was nothing to recant." Cert. Pet. App., at 36a; *see also* Cert. Pet., at 6 n.5. But respondents still repeat this claim in their brief to this Court, citing as their record support nothing other than Mr. Orren's original, unsupported assertions made during oral argument. *Compare* Opp. Cert., at 3 (citing Opp. Cert. App., at 5a, 11a) *with* Opp. Cert. App., at 5a, 11a (statements by Mr. Orren).[10] Respondents repeatedly use this technique to concoct "facts" which have no evidentiary support.[11]

Alternatively, sometimes respondents simply misstate the record. For example, respondents deny that respondent Wilson and her attorney hid Talassa from petitioner when the latter first came to retrieve her daughter in Minnesota. *See* Cert. Pet. App., at 34a-35a, 58a-59a. Instead, respondents claim, "Petitioner admits that she knew exactly where T.B. was located." Opp. Cert., at 5. But respondents' citation to petitioner's affidavit does not concern petitioner's first trip to

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[10] The Department of Social Services letter cited by respondents, *see* Opp. Cert., at 3-4, merely recites the agency's conclusion that no abuse had occurred. Cert. Pet. App., at 47a-48a.

[11] *E.g.*, *compare* Opp. Cert., at 4 (*Talassa* asserted she was threatened with abuse) (citing Opp. Cert. App., at 5a, 8a) *with* Opp. Cert. App., at 5a, 8a (statements by Ms. Nord); *compare* Opp. Cert., at 4 (*Talassa* stated she was afraid of physical abuse) (citing Opp. Cert. App., at 4a) *with* Opp. Cert. App., at 4a (statement by Ms. Nord).

Minnesota, when Talassa indisputably was hidden from petitioner, *see* Cert. Pet. App., 58a, but instead refers to petitioner's second trip to Minnesota, after she obtained a temporary custody order from the New York court. Cert. Pet. App., at 35a. This is not the only instance of respondents' apparent attempt to mislead this Court.[12]

None of respondents "facts" affect the reviewability of the questions presented.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] *E.g.*, *compare* Opp. Cert., at 2-3 (claiming Talassa has lived in Minnesota for nine years) *with* Cert. Pet. App., at 29a-33a (even including the year since her abduction, Talassa has lived in Minnesota for less than eight years); *compare* Opp. Cert., at 9 (claiming Judge Thuet held that the New York custody order "was not made consistently with the *provisions of the PKPA*") (emphasis added) *with* Cert. Pet. App., at 13a-15a (no mention of PKPA).